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FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 1300 I STREET, NW WASHINGTON, DC 20005			EXAMINER YU, GINA C	
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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/692,155  
Filing Date: October 20, 2000  
Appellant(s): DECOSTER ET AL.

MAREESA A. FREDERICK  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed on July 14, 2004.

**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is correct.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) *Summary of Invention***

The summary of invention contained in the brief, p. 3, lines 6-10 is correct.

**(6) *Issues***

The appellant's statement of the issues in the brief is correct.

**(7) *Grouping of Claims***

Appellant's brief includes a statement that claims 1-85, 94, and 95 stand or fall together.

**(8) *Claims Appealed***

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) *Prior Art of Record***

EP 0874017	DALLE ET AL.	10-1998
US 5,863,943	GROH	01-1999
US 5,804,207	DUBIEF ET AL.	09-1998

US 4,183,917	IWAO ET AL.	01-1980
US 6,039,936	RESTLE ET AL.	03-2000

**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**1. Claims 1-16, 44-47, 56, 73, 74, 81-85, 94, 95 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dalle et al. (EP 0874017) (“Dalle”) in view of Groh (US 5863943).**

Dalle et al. teach a method of making silicone in water emulsions comprising at least one silicone compound that reacts with the polysiloxane of formula (I) in claim 1 by chain extension reaction, and at least one surfactant among anionic, nonionic, amphoteric, and cationic surfactants. See p. 1, line 34 – p. 4, line 17. In the reference, 9 parts by weight of polysiloxane is used, which meets claims 13-14 in the instant application. See Examples 1-3 on p. 6. The particle size of the silicone copolymer is also in the range of 0.3 – 100  $\mu\text{m}$ , which meets claims 15-16. See p. 5, lines 35-41. Dalle teaches that the emulsions here can be used in cosmetic compositions including personal lotions and emulsions. See p. 5, lines 46 – 57. The reference further teaches that the silicone is “lubricious and will improve the properties” of the compositions.

Groh teaches a skin conditioning oil-in-water lotion. See col. 4, lines 10 – 36. See instant claims 1 and 73. The reference teaches that the non-aqueous phase of the

Art Unit: 1617

emulsion comprises moisturizing or emollient elements such as polydecenes, polyisobutens, hydrogenated polyisobutenes, or the mixture thereof. See col. 2, lines 48 – 59. The reference also teaches using emollients other than traditional oils as all or part of the non-aqueous phase, wherein the emollients may be synthetic liquid silicone polymers. See col. 2, line 58 – col. 3, line 29. The reference also teaches using nonionic surfactants such as glyceryl stearate, steareth-21, -2, and cetearyl alcohol. See col. 3, line 52 – col. 4, line 9. See Table 1, Inventive Composition. See instant claims 44-47 and 56.

Given the teaching of the application of the silicone copolymer of Dalle in personal care lotion compositions, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have looked to the prior arts such as Groh because of an expectation of successfully producing a skin conditioning aqueous emulsion composition. The skilled artisan would have been motivated to add the traditional emollient oils such as polydecene because of an expectation of successfully producing a skin care composition with good emolliency property.

**2. Claims 1-16, 44-71, 74, 81-84, 94, and 95 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dalle in view of Dubief et al. (U.S. Pat. No. 5804207) (“Dubief”).**

While Dalle teaches that the invention is applicable in formulating emulsion and shampoo compositions, the reference fails to teach the oil and surfactants of instant claims.

Dubief teaches a cosmetic emulsion composition for cleansing hair. The reference teaches the surfactants of instant claims 44-69 and the amount to use them in a cosmetic composition are well known in the art. See col. 2, line 25 - 4, line 66; col. 5, lines 27 – 34.

The Dubief reference also teaches using oil components. See col. 6, lines 24 – 31. See Examples. The formulation is said to have good washing properties and cosmetic properties such as softness, disentangling, and styling, and “non-runny and melting texture”. See col. 2, lines 46-49.

Given the teaching of the application of the silicone copolymer of Dalle in emulsion or shampoo compositions, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have looked to the prior arts such as Dubief because of an expectation of successfully producing an emulsion shampoo composition. The skilled artisan would have been motivated to add the well-known surfactants in the Dubief reference because of an expectation of successfully producing an emulsion shampoo composition with good washing and cosmetic properties, and good texture.

**3. Claims 1-17, 25, 27, 44-46, 56, 70, 71, 73, 74, 81-84, 94, and 95 are rejected under 35 U.S.C. 103(a) as being unpatentable over Iwao et al. (US 4183917) (“Iwao”) in view of Dalle.**

Iwao teaches hair conditioner compositions comprising synthetic oils, such as alpha-olefin polymers. See col. 2, lines 23 – 43. See instant claim 1(A), 94, and 95. The reference further teaches adding quaternary ammonium salts such as distearyldimethylammonium chloride. See col. 2, lines 44 – 59; Table 2 and Examples. See also instant claims 17 (IV), 25, and 27. The reference also teaches to use nonionic surfactants such as polyoxyethylene stearylether. See col. 2, line 60 – col. 3, line 13. See instant claims 44-47, 56.

Iwao et al. fail to teach the silicone copolymer recited in the instant claims.

Dalle, discussed above, teaches that the silicone emulsion is useful in formulating hair products such as hair conditioner, for providing conditioning benefits. See p. 5, lines 51-52.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the composition of Iwao by adding the silicone copolymer emulsion as motivated by Dalle, because of the expectation of successfully producing hair conditioner composition which provide enhanced conditioning benefits to the hair.

**4. Claims 18-24, 26, 28-43, 47-51, 60, and 65-69 are rejected under 35 U.S.C. 103(a) as being unpatentable over Iwao and Dalle as applied to claims 1-17, 25, 27, 44-46, 56, 70, 71, 73, 74, 81-84, 94, and 95 above, and further in view of Restle et al. (U.S. Pat. No. 6,039,936).**

While Iwao and Dalle teach quaternary ammonium cationic surfactants, the combined references fail to teach all of the specific surfactants recited in the instant claims.

Restle teaches that the cited quaternary ammonium surfactants are well known in the art. See col. 3, line 4 – col. 6, line 38. The Restle invention is directed to cosmetic oil-in-water emulsions comprising nonionic amphiphilic lipids (silicone surfactants) and cationic amphiphilic lipids. See col. 1, lines 36 – 67. Examples 1 and 2 in the reference also teach employing 1.5 % of the disclosed cationic amphiphilic lipids. See instant claims 41-43. See col. 8, lines 21 – 24 and Example 5 for the application of the composition in personal care products and the surfactants used therein. See instant claims 44-51, 60, 65-84. The Restle reference also teaches the use of synthetic oils including synthetic essential oils, polyethers, and silicone oils. See col. 7, lines 1 – 17. The reference further teaches that the advantages of the compositions include an enhanced penetration of

active cosmetic ingredients on hair, and glossy appearance without greasy feel and softness. See col. 1, lines 36-49.

It would have been obvious to one of ordinary skill in the art at the time of the invention to have modified the composition of the combined references by substituting the cationic surfactants there with the cationic amphiphilic lipids in Restle et al. because of the expectation to have produced compositions which would provide similar glossy appearance, and softness on the hair. The claimed process is viewed an obvious use of the prior art compositions.

**(11) Response to Argument**

Examiner views that applicants make factually and legally erroneous to support their positions. Generally, applicants assert here that examiner's obviousness rejections are not supported by evidences to show why one of ordinary skill in the art would have been motivated to combine the cited references. However, applicants have disregarded the specific facts which examiner had cited from the prior arts in order to support the prima facie case of obviousness.

The Dalle reference specifically teaches in what cosmetic products the presently aimed silicone copolymers are to be used, and what effects the silicone copolymer will have on these cosmetic products, and even how much the silicone is to be used. On p. 5, line 47 – p. 6, line 7 of the reference, it is explicitly stated that the Dalle silicone is “lubricious and will improve the properties of skin creams, skin care lotions. . . bath oils,” etc. The reference goes on to teach that the silicone is also used in making shampoo or hair conditioner “to provide conditioning benefits”. The silicone is also said to be useful as a delivery system for oil and water soluble substances“. The reference further teaches in



line 56-57, "when compounded into sticks, gels lotions, aerosols, and roll-ons, the emulsions of the invention impart a dry silky-smooth payout". The reference teaches that the silicone is "added to conventional ingredients for the personal care product chosen". See p. 6, lines 1- 2. The examples of the "conventional ingredients" are disclosed also, including moisturizing agents. See p. 6, lines 2-4.

Applicants do not seem to recognize these facts when applicants assert that the examiner's proposed combination of the teachings has no motivation. It is examiner's position that the Dalle reference provides ample motivation for a routineer to use the Dalle silicone copolymer in formulating the disclosed cosmetic compositions. What is absent in the Dalle reference is the specific formulation of these cosmetics. Given the specific teachings of in what cosmetic or personal products these Dalle silicone copolymers are used, and what type of cosmetic benefits will be obtained by using these silicones, the skilled artisan would have had the motivation to combine the teachings of the cosmetic formulations of those cosmetic products taught by Dalle. The Groh, Dubief, and Iwao references respectively teach the specific formulations for skin lotion, hair shampoo, and hair conditioner comprising the presently claimed conditioning oil component. Examiner thus concluded that it is prima facie obvious to incorporate the Dalle silicone copolymer to make 1) a skin lotion in view of Dalle/Groh; 2) hair shampoo in view of the Dalle/Dubief; and 3) hair conditioner in view of Iwao/Dalle. Applicants' arguments here that no motivation to combine the references exists lacks factual and legal support. Examiner asserts that the rejections should be affirmed.

**A. DALLE IN VIEW OF GROH**

Art Unit: 1617

**1. Dalle provides motivation for one of ordinary skill in the art to look for skin care composition formulation**

While applicants assert that the list in Dalle, page 4, line 56-p. 5, line 1 “does not include oils”, the argument is incorrect because the reference in fact teaches using the silicone in “bath oils”. See p. 5, line 5. Furthermore, Dalle teaches that the silicone copolymer is “luscious and improve properties” of skin care lotions or creams. If a traditional formulation for skin care lotion requires oil, one of ordinary skill in the art would be obviously motivated to formulate the composition accordingly, absent evidence to the contrary.

Applicants assert, “nothing from Groh’s disclosure would have led a person of ordinary skill in the art to select, out of context, Groh’s traditional emollient oils, for use in Dalle’s silicone emulsion”. The argument is not persuasive for a simple reason. The rejection is based on the notion that it would have been obvious to make the specific cosmetic products of Dalle from the formulations disclosed in Groh because both references were available to the skilled artisan at the time of the present invention. While applicants’ broadly claimed invention requires only two components – the Dalle silicone copolymer and a conditioning agent, such as the Groh’s emollient oil, the claim is not limited to only those two compounds. The claimed composition is opened to include any other component not recited in the claims, such as the other components required to make the Groh skin care compositions. Applicants’ assert that the two references somehow cannot be combined lacks factual support.

**2. The rejection is made based on specific reasons why a routineer would be motivated to combine Dalle and Groh**

Applicants argue that the rejection is based on mere identification of the known components. Again, applicants appear to ignore the fact that Dalle teaches the application of the silicone copolymer in specific cosmetic products and the benefits thereof. Also disregarded by applicants is the fact that Groh teaches the specific formulation how to make the cosmetic compositions taught by Dalle. Applicants also appear to find no obviousness in using Groh traditional emollient oil in expectation of obtaining emolliency property.

Applicants also assert that the compositions comprising the conditioning compositions with cationic polymers and silicones are known but "may not always be entirely satisfactory".

This is a mere anecdotal statement and does not rebut how the specific prior arts, the combined teachings of Dalle and Groh, are inoperable. There is no declaration in the record to show any evidence to support applicants' position.

**3. It is unreasonable to assume that the Dalle silicone copolymer cannot be combined in the Groh skin conditioning emulsion without any convincing evidence**

In response to applicant's argument that the Dalle/Groh combination is somehow unreasonable and inoperable, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). Examiner asserts that the facts are clear in this case that a skilled artisan in cosmetic art would have found the motivation to combine the Dalle and

Art Unit: 1617

Groh references. On the other hand, applicants rely on the background statement in Groh to assert that oil-in-water emulsions are difficult to make. In fact, the statement in the reference specifically refers to the emulsions comprising alpha-hydroxy acids, and the Groh patent shows how to overcome this disadvantage and make a stable cosmetic emulsion comprising the acid. That is the driving force why one of ordinary skill in the art would have looked to Groh – the expectation of successfully producing a stable cosmetic product. The Groh reference even teaches that synthetic silicone copolymer oils comprising alkyl groups having 1-6 carbon atoms in the monomer unit, as claimed by applicants, are suitable for the emulsion. The facts, although ignored by applicants, are clear that there is a reasonable expectation of success in combining the Dalle silicone copolymer to the Groh formulations. There is no objective evidence in the record to indicate that the specific combination of Dalle and Groh is unreasonable or inoperable.

#### **B. DALLE IN VIEW OF DUBIEF**

Applicants assert in length that there is a “modification” of position by the examiner in the advisory action. Examiner clarifies that there was no such change of position in this case, as the statement in the advisory was made to clarify and explain the position of the Office in more details in response to applicants’ After Final remarks. It is also noted that the present issue at appeal is whether the final rejection indicated in the Office action dated October 22, 2003, was properly made, and not whether a statement in an advisory action is properly made.

While Dalle clearly teaches to use the silicone copolymer to make hair shampoo composition to obtain conditioning benefits, there is no formulation for a skilled artisan to

make the composition. It is obvious that the routineer would look to the prior art such as Dubief and use the shampoo formulation there to obtain the benefits of the Dalle silicone.

**1. One of ordinary skill in the art would have been motivated to combine the teachings of Dalle and Dubief in expectation of successfully producing a hair conditioning shampoo composition**

Applicants argue that there can be absolutely no modification to the Dubief composition. Applicants point out that from the Dubief disclosure that a comparison composition lacking one of the required surfactants shows inferior results than the Dubief composition, and then somehow draw the conclusion that the Dalle silicone copolymer cannot be incorporated into the Dubief formula. And then applicants dismiss the specific disclosure by the Dubief reference that "modified or unmodified silicone oils" can be added to the formula, reasoning that Dubief does not specifically teach the silicone oils to be the silicones of Dalle. Examiner asserts that applicants have not properly considered the probative value of the evidences here. The comparison test in the Dubief reference is to show the effectiveness and nonobviousness of the Dubief invention itself over other prior arts. That does not at all hinder one of ordinary skill in the art from modifying the Dubief composition by incorporating other beneficial cosmetic additives, such as the Dalle silicone copolymers, in order to obtain the hair conditioning properties.

**2. Examiner's proposed combination of the Dalle and Dubief references would result in the claimed invention**

Applicants assert that the Dalle/Dubief combination would not result in the claimed invention allegedly because the resulting composition claim 1 recites specific type of compositions as limitation, except for shampoos. The argument is not persuasive. The

listed “forms” of compositions such as “rinse-out conditioner, a leave-in condition, a composition for permanent-waving the hair”, etc., only refer to the intended to use or purpose of the claimed composition. No patentable weights are given to these terms. In fact, examiner did give weight to the term “emulsion” because the term has a structural limitation in that an emulsion requires a dispersed phase in the continuous outer phase. Thus the Dubief shampoo composition which comprised dispersed oil phase meets this limitation.

Applicants further asserts that the examiner’s statement that a routineer would have been motivated to add the Dubief surfactants to produce an emulsion shampoo is “factually incorrect”. Nor Applicants provide any reasonable explanation why such is the case. While applicants assert, “a dispersion is different from an emulsion”, this statement is erroneous. It is well known in chemical or cosmetic art that emulsion is a two immiscible phase liquids, one being dispersed in the other. One of ordinary skill in the art would know what an emulsion is, as it is a frequently employed form in cosmetic art, as evidenced by the cited references herein. Applicants statement “[I]t is known by those skilled in the art that shampoos are generally not emulsions” also lacks factual support, and is contrary to the teaching by Dubief. It would have been obvious to a routineer that a dispersion of oil particles in aqueous medium as taught by Dubief, col. 6, lines 24-31 and illustrated in Examples 2 and 3 is an emulsion.

**3. It would have been obvious to one of ordinary skill in the art to use the Dalle silicone copolymers in conjunction with Dubief synthetic oils**

Regarding the examiner’s remarks made in advisory action, applicants assert that Dubief fails to teach that the synthetic oils are used as moisturizing agents but only

discloses the oils in the "laundry lists of water-insoluble particles that can be incorporated into its four-component composition." In response, examiner asserts that the recitation of the dispersible water-insoluble particles in col. 6, lines 24-31 does not constitute a laundry list so as to render using any of these components a random selection. Examples 2 and 3 even illustrate the use of polydimethylsiloxane oil.

Applicants assert that there would have been no motivation to use synthetic oils even in light of the teaching in Dalle that the silicone copolymer can be combined with a moisturizing agent. Again, the argument is unpersuasive for lack of support. Furthermore, it is noted that the examiner's statement in advisory action was made then in response to applicants' arguments. At issue here is whether the rejection in the Office action dated October 22, 2003 is properly made. The rejection is based on the fact that oils are used to formulate a shampoo composition as taught and illustrated by Dubief. Example 3 in Dubief contains synthetic silicone oils and dimethicone copolyol, which shows the use of a silicone copolymer in the shampoo formulation. Examiner asserts that the references provide sufficient motivation to combine the references to make the claimed invention.

### **C. IWAQ IN VIEW OF DALLE**

#### **1. Examiner's proposed combination of the references is fully supported by facts and law**

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in

the art. See In re Fine, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and In re Jones, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

In this case, Applicants states, "Dalle teaches only a method of making silicone in water emulsion, thus, nothing in this disclosure even remotely suggests the use of its silicone/water emulsions with Iwao's synthetic oils". Here, applicants appear to have disregarded the specific and unambiguous teaching in Dalle that the silicone copolymers are used in hair conditioners to render hair conditioning benefits. Applicants further assert, "nothing in Iwao suggests the desirability" of combining Dalle with Iwao. The desirability to the modification is found in the both references. Iwao teaches hair conditioner formulation. Examiner reiterates that Dalle teaches hair conditioning benefits of the silicone copolymer and the application of the silicone in hair conditioner. The rejection is made in view of the two references available to one of ordinary skill in the art at the time the present invention was made, and should be construed in view of the collected teachings therein.

Applicants' argument that a routineer would not have been motivated to search for suitable replacements for an optional ingredient is not persuasive. Dalle specifically teaches the benefits of its silicone copolymer. While the desirability to use the Dalle component was plainly taught in the reference, applicants' argument is not based on any facts.

While applicants assert that the examiner's proposed modification is implausible in view of the teachings on the advantages of liquid ester oil as an optional ingredient, there is no factual or legal support for the argument. Examiner views that the mere disclosure of an advantageous feature of a prior art does not in any way constitute a teaching away from combining it with other references.



**2. Applying In re Kerkhoven to the facts of the present case is proper**

Applicants assert, "it is improper for the Examiner to rely on Kerkhoven to establish a prima facie case of obviousness without first establishing the elements of a prima facie case as required by the Supreme Court's decision in Graham v. John Deere". The argument has both factual and legal flows in it. First, applicants' assertion that no Graham factors were applied in the rejection is not true. Examiner had layed out in the rejection how the legal conclusion of prima facie obviousness is made in view of the Graham case. See above rejection; Office action dated October 22, 2003, p. 6, first full par. The rejection made it clear that the skilled artisan at the time of the present invention would have had a motivation to combine the lwao hair conditioner and Dalle hair conditioning silicone copolymer in expectation of making an enhanced hair conditioning composition.

In re Kerkhoven was cited in the examiner's arguments to respond to applicants' arguments during the prosecution. Nevertheless, examiner views that the reliance on Kerkhoven alone to establish a prima facie case of obviousness would have been also proper since the court holding of the Kerkhoven court must have been consistent with the Graham decision. Examiner views that applicants' position is not persuasive unless it can be shown that the Kerkhoven court was somehow inconsistent with the Graham decision.

Applicants assert that the present facts are distinct from the facts of the Kerkhoven case. Instead of first recognizing that both lwao and Dalle teach hair conditioning agents, applicants assert that the combination of the references merely amounts to "try[ing] various combinations of known cosmetic ingredients in an attempt to obtain the claimed invention, which is not the standard required by law". However, the present rejection is not based on a various combination of random cosmetic ingredients; rather, the facts are clear in that

applicants' ingredients are well known hair conditioning agents. According to Kerkhoven, it is prima facie obvious to combine the two hair conditioning agents to make a hair conditioning composition.

**D. IWAQ IN VIEW OF DALLE AND FURTHER IN VIEW OF RESTLE**

**1. Applicants' argument that Restle does not cure the deficiencies of Iwao and Dalle is moot for the reasons above**

**2. Restle provides objective evidence as to why a skilled artisan would have combined the claimed surfactants to the composition of the Iwao/Dalle combination**

Applicants assert that the rejection is not proper because Restle fails to teach "selecting one limitation from its invention, i.e., the cationic amphiphilic lipids, and incorporating it into a composition comprising Dalle's silicone emulsion". Again, applicants ignore the fact that the reason to select the cationic amphiphilic lipids to use it in a hair conditioner is cited by examiner in the rejection.

**3. There is a reasonable expectation in successfully making the proposed combination sufficient to make a prima facie obviousness case**

Relying on a background information of the emulsion art disclosed by Iwao, applicants argue that there is no reasonable expectation of success in making the alleged modification because "even known agents, when combined with synthetic oils, may not lead to a known result". Again, applicants are citing general background information in attempt to rebut the specific teaching of a prior art. Applicants assert, "merely changing one ingredient or increasing the amount of an ingredient could ruin the texture or the stability of the emulsion". The statement is a mere conjecture not supported by any objective evidences or specific facts.

Applicants' repeated statements that the rejections are made without evidences are erroneous and without grounds. Examiner asserts that the rejections are proper and fully supported by the specific teachings of the references as discussed in the Office action.


For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



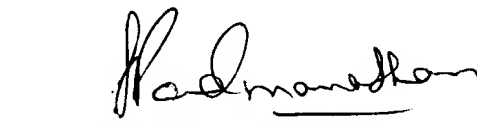
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